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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

THE PEOPLE, Plaintiff and Respondent, v. JOSHUA MARQUIS GRINSTEAD, Defendant and Appellant.	C085875 (Super. Ct. No. CRF-2017-2724)

Defendant Joshua Marquis Grinstead appeals a judgment entered after a jury found him guilty of theft or unauthorized driving of a vehicle (Veh. Code, § 10851, subd. (a)—count 3), but could not reach verdicts on counts of assault by means likely to cause great bodily injury (Pen. Code, § 245, subd. (a)(4)[1]—count 1), its associated enhancement (§ 12022.7, subd. (a)), and battery with serious bodily injury (§ 243, subds. (d), (f)(4)—count 2), resulting in their dismissal in the interests of justice.

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[1] Undesignated statutory references are to the Penal Code.

Defendant argues that the victim, although a reluctant witness, was not unavailable and that the trial court therefore erred in allowing his preliminary hearing testimony to be read into the record. He also challenges the sufficiency of the evidence supporting his conviction and asserts the trial court committed instructional error. Finally, he argues that under *People v. Page* (2017) 3 Cal.5th 1175, his conviction must be reduced to a misdemeanor with the potential for retrial at the People's election. The People agree that remand for retrial with proper instructions in light of *Page* is required, but oppose defendant's remaining arguments.

We conclude the trial court erred in allowing the introduction of the victim's preliminary hearing testimony, but that substantial evidence supports defendant's conviction. We therefore reverse the judgment and remand for retrial.

BACKGROUND

We limit this description to the portions of the People's case relevant to defendant's claims on appeal. Additional facts are discussed later in the opinion, as necessary.

Gloria W. testified that she was with the victim, Marlin H., at a motel on the day of the crime. The couple was between snooze buttons on Marlin's 9:00 p.m. alarm when there were three or four loud knocks at the door. Marlin responded by looking out the window and may have exclaimed, "Fuck," or, "Is that that nigga?" He appeared irritated. Marlin quickly dressed and left the room without saying goodbye or taking his backpack. Gloria looked out the window, but did not see anyone. Gloria concluded that Marlin had driven off because his car was gone, but did not see him leave. Gloria speculated that Marlin "was looking to get in trouble" when he left. A day or two later, Marlin told her, "I rolled up on the niggas, hopped out the car, and I was ready to go."

Gloria explained that she had planned to let the defendant and a man named Jaron Culver stay in her motel room after Marlin went to work that night because "they didn't

have anywhere to go," and she was going to go home.[2] Marlin did not know about this arrangement, and Culver was supposed to wait until after Marlin left. Culver was to come at 9:30 p.m., which was about when the knocking occurred. When police spoke with Gloria later that night, they discovered threatening messages from Culver on her phone that she had not read.[3] Gloria denied that Culver was jealous of Marlin, but conceded it was a "bad situation," which she believed was her fault "for kind of pretty much leading [Culver] on."

Having found Marlin to be an unavailable witness, his preliminary hearing testimony was read into the record. Marlin only testified at the preliminary hearing because he had been subpoenaed and was informed that if he failed to answer questions he would be in contempt of court. On the day in question, Marlin testified that he and Gloria were staying at a motel when there was a loud, booming knock at the door. Marlin looked out the window. Initially, he did not recall seeing anything, but later remembered seeing two people in hoodies.

Marlin then got into his black Lexus automobile and drove out to investigate. Marlin saw two men. He drove up from behind them, pulling over about 10 feet in front of them. He jumped out and asked if they knocked on his door. The men did not respond; they just started fighting. Marlin threw the first punch in self-defense because

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[2] Gloria had a previous romantic relationship with codefendant Jaron Culver and had met defendant once when Culver brought him to her job cleaning motel rooms. Gloria also had a romantic relationship with the victim, Marlin, whom she was still seeing at the time she testified. There was overlap between these relationships, and Culver knew of Marlin and vice versa. Before the charged crimes, Gloria ended her relationship with Culver in favor of her relationship with Marlin

[3] Gloria denied telling detectives that Culver had sent text messages threatening her and Marlin. The jury was instructed it could not consider these messages when determining defendant's guilt, both at the time of the testimony and again in special jury instruction No. 2.

one of the men was right at his door when he got out of his car. The punch knocked the man to the ground, but he later rejoined the fight. They fought for four to five minutes. The men took his car, which had been left idling. They did not have Marlin's permission to take it. The next thing Marlin remembered after the fight was walking to a store and calling his sister to come get him. Marlin knew Culver was Gloria's ex-boyfriend, but denied ever meeting or seeing a picture of him. He had never seen his attackers before.

Sergeant Eugene Semeryuk of the West Sacramento Police Department testified he was the first officer on the scene and encountered Marlin laying on the ground near a minimart. Despite having difficulty speaking, Marlin was able to tell Semeryuk "he was jumped by two [B]lack males that were approximately 30 years old, about his height, and they were wearing dark hoodies, and they had taken his car." Authorities identified Marlin's Lexus and broadcast a call to be on the lookout.

Officer Nvard Avagyan confirmed Marlin's statement that two Black men had assaulted him and taken his car. He also testified concerning surveillance video from the minimart, which showed two men walking by at 9:46 p.m., and then at approximately 9:51 p.m., the Lexus pulled in; Culver exited and later reentered the driver's door. Culver then drove away, as an injured Marlin approached the minimart on foot.

Officer Nathan Strickland testified to pulling over Marlin's Lexus about 45 miles from West Sacramento on the freeway. Culver was driving and defendant was a passenger. Culver and defendant were handcuffed, placed in separate cars, and then transported to the West Sacramento Police Department. Detective David Stallions testified to seeing defendant and Culver when they arrived. Defendant had facial and hand injuries consistent with having been in a fight.

The parties' closing arguments focused principally on whether defendant and Culver acted in lawful self-defense and inferences that should be drawn from Marlin's failure to testify at trial. Culver's attorney did not mention the Vehicle Code section 10851, subdivision (a) violation alleged in count 3. Defendant's attorney summarily

addressed count 3, arguing the taking of the car was merely to further their self-defense from an unprovoked attack, that the prosecution had not proved defendant facilitated the car's theft, and that defendant, who had been injured in that attack, merely "want[ed] to get away." In rebuttal, the People countered it was clear Culver and defendant intended to steal Marlin's car, and if they had been scared, they could have sought assistance from the minimart without taking the car that they were found driving near Fairfield. The People also argued that the use of force in self-defense was excessive and unlawful.

The jury was unable to reach verdicts on the charged assaultive conduct contained in counts 1 and 2, resulting in the court declaring a mistrial for those counts. However, the jury returned guilty verdicts against Culver and defendant for the Vehicle Code section 10851, subdivision (a) violation. Rather than retry counts 1 and 2, the People asked that they be dismissed in the interests of justice, which the court granted. Defendant was placed on three years of felony probation with the terms recommended by probation. The court also dismissed another misdemeanor from an unrelated matter in the interests of justice.

DISCUSSION

Defendant challenges the admission of Marlin's preliminary hearing testimony arguing: (1) the People did not use sufficient diligence to secure Marlin's appearance at trial, (2) the preliminary hearing transcript was insufficient to satisfy defendant's confrontation clause rights under *Crawford v. Washington* (2003) 541 U.S. 36 [158 L.Ed.2d 177], and (3) without this improperly admitted evidence, insufficient evidence supported his conviction, requiring reversal and dismissal. We agree that the People failed to exercise due diligence in the attempts to secure Marlin's attendance at trial, but that sufficient evidence supported defendant's conviction.

I

The Trial Court Erred in Admitting Marlin's Preliminary Hearing Testimony

A. *Applicable Law*

"The confrontation clauses of both the federal and state Constitutions guarantee a criminal defendant the right to confront the prosecution's witnesses. (U.S. Const., 6th Amend.; Cal. Const.[,] art. I, § 15.) That right is not absolute, however. An exception exists when a witness is unavailable and, at a previous court proceeding against the same defendant, has given testimony that was subject to cross-examination. Under federal constitutional law, such testimony is admissible if the prosecution shows it made 'a good-faith effort' to obtain the presence of the witness at trial. [Citations.] California allows introduction of the witness's prior recorded testimony if the prosecution has used 'reasonable diligence' (often referred to as due diligence) in its unsuccessful efforts to locate the missing witness. (Evid. Code, § 240, subd. (a)(5) . . . .)" (*People v. Cromer* (2001) 24 Cal.4th 889, 892 (*Cromer*).)

"[T]he term 'due diligence' is 'incapable of a mechanical definition,' but it 'connotes persevering application, untiring efforts in good earnest, efforts of a substantial character.' [Citations.]" (*Cromer, supra,* 24 Cal.4th at p. 904.) Relevant considerations include when the attempt was made to compel the witness's attendance, the nature of the attempts made, characteristics of the witness, whether there was reason to believe the witness would appear for trial, and whether the witness could have been produced with reasonable efforts. (See *ibid.*; *People v. Sanders* (1995) 11 Cal.4th 475, 523; *People v. Louis* (1986) 42 Cal.3d 969, 991-993 (*Louis*), disapproved on other grounds in *People v. Mickey* (1991) 54 Cal.3d 612, 672, fn. 9.) Notably, "the measure of due diligence is not the difficulties imposed by a search for a witness, but rather the diligence exercised in surmounting those difficulties." (*People v. Enriquez* (1977) 19 Cal.3d 221, 236 (*Enriquez*).)

The proponent of the evidence has the burden of establishing due diligence (*Enriquez, supra*, 19 Cal.3d at p. 235), and the requisite showing is heightened where "the absent witness is vital to the prosecution's case and his credibility is suspect." (*Louis, supra*, 42 Cal.3d at p. 991.) When, as here, the facts are undisputed, we review this determination independently. (*Cromer, supra*, 24 Cal.4th at p. 901.)

B. *Facts Relevant to the Finding of Diligence*

The People were aware that Marlin was a reluctant victim/witness. In fact, at the March 1, 2017 preliminary hearing, he stated that he was only there because he was under subpoena facing sanctions for noncompliance. And when the People could not secure Marlin's testimony leading up to the first trial scheduled for May 30, 2017, the case was dismissed and refiled.[4]

Marlin was personally served with a subpoena on June 19, 2017, to appear in court on June 23, 2017;[5] however, Marlin told the person who served him that "he [had] already testified once and did not want to deal with the case anymore." Marlin failed to appear in court at the arraignment on June 23, 2017, resulting in the People's motion for a material witness warrant and the court's July 6, 2017 order granting the warrant.

The record contains no evidence of any attempts to secure Marlin's attendance or to arrest him on the material witness warrant before the start of trial on July 24. In fact, the People conceded no such efforts were made. Thus, despite Marlin's history of

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[4] The Yolo County District Attorney's process server attempted to call Marlin on May 18 and May 23, but his voice mailbox was full. The process server left business cards and copies of the subpoena at defendant's home, and on one of the days spoke with defendant's roommate who said Marlin had left for work early that morning. On May 23, the process served also asked the Contra Costa County District Attorney's Office for help in serving the subpoena. None of these efforts were successful.

[5] This was the second attempt to serve him with that subpoena, as the process server's June 17, 2017 attempt to contact Marlin at his home and on his phone were both unsuccessful. Marlin's phone had been disconnected.

noncompliance and the critical importance of his testimony, the People let two and a half weeks pass without any efforts to secure Marlin's attendance at trial.

Instead, on the first day of trial, the People moved for an order declaring Marlin to be unavailable, allowing them to present Marlin's preliminary hearing testimony. They cited the substantial efforts previously expended to secure his attendance for the first trial and subsequent arraignment for which he failed to appear. This precluded the court from ordering Marlin back for trial and resulted in the issuance of the material witness warrant.

The trial court granted the request over defendant's objections regarding due diligence and the sufficiency of cross-examination protected by the confrontation clause, finding that the People had established Marlin's unavailability and that efforts had been made to impress upon him the importance and need for him to attend trial and testify.

C. *Application*

The People were required to exercise reasonable diligence to surmount the known difficulties of securing Marlin's attendance for trial. (See *Enriquez, supra,* 19 Cal.3d at p. 236.) Despite the previous difficulties securing Marlin's attendance, the People inexplicably ceased all efforts to secure that testimony after obtaining the material witness warrant following Marlin's nonappearance at the arraignment. However, merely obtaining a material witness warrant does not establish due diligence. (*Id.* at p. 237.)

Further, despite previous experience showing that Marlin could be located, but only after sustained efforts, the People waited until the first day of trial to attempt to serve him with the material witness warrant. Waiting until trial is inconsistent with due diligence under these circumstances. (See *People v. Sanders, supra*, 11 Cal.4th at pp. 524-525 [due diligence not met where People knew of importance and reluctance of witness, but waited until pendency of trial to try and secure witness's attendance]; *People v. Avila* (2005) 131 Cal.App.4th 163, 169 [unreasonable to wait until the first day of trial to contact witness with whom no contact had been made for several months].)

Had the People diligently attempted to execute the material witness warrant within the two and half weeks between its issuance and the start of trial, Marlin likely could have been brought to court to testify. Not only had previous, sustained attempts to locate Marlin been successful, Gloria testified that she saw Marlin just three days before she testified at trial. That Marlin did not want to testify does not excuse the People's lack of diligence in working to secure his testimony—it simply indicated that additional effort was needed. (See *Enriquez, supra*, 19 Cal.3d at p. 236.) This is especially true given (1) the importance of Marlin's testimony as the victim and only direct witness to the alleged assault and car theft, and (2) because of issues concerning Marlin's credibility, including differences between his testimony and that of Gloria. (See *Louis, supra*, 42 Cal.3d at p. 991.)

We acknowledge that where reasonable efforts have been taken to secure a witness's attendance, the fact that additional steps may have been taken does not require exclusion of the prior testimony evidence. (*People v. Diaz* (2002) 95 Cal.App.4th 695, 706.) " 'The law requires only reasonable efforts, not prescient perfection.' [Citation.]" (*Ibid*.) However, here, reasonable efforts were not taken to secure Marlin's testimony at trial, and thus, his preliminary hearing testimony should have been excluded as violating defendant's right of confrontation. (See *Enriquez, supra*, 19 Cal.3d at pp. 235, 237.)

Neither party's briefing substantively addresses whether this error was prejudicial. However, given the importance of Marlin's testimony, we easily conclude that its erroneous admission was not harmless beyond a reasonable doubt, thus requiring reversal for retrial. (See *Enriquez, supra*, 19 Cal.3d at p. 237, applying the prejudice standard articulated in *Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705, 710-711].)

II

Defendant's Conviction Was Supported by Substantial Evidence

Having determined that the trial court erred in admitting Marlin's testimony, we must determine whether substantial evidence supported defendant's conviction because,

if it is not so supported, his retrial would be barred by double jeopardy. (*People v. Hatch* (2000) 22 Cal.4th 260, 271-272.) We conclude that substantial evidence supports his conviction and thus will remand for retrial.[6]

A. *Standard of Review*

" 'In assessing a claim of insufficiency of evidence, the reviewing court's task is to review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] . . . The standard of review is the same in cases in which the prosecution relies mainly on circumstantial evidence. [Citation.] " 'Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court[,] which must be convinced of the defendant's guilt beyond a reasonable doubt. " 'If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment.' " [Citations.]' " [Citation.]' [Citation.]" (*People v. Story* (2009) 45 Cal.4th 1282, 1296.)

Further, "when reviewing the sufficiency of the evidence for purposes of deciding whether retrial is permissible, the reviewing court must consider *all* of the evidence presented at trial, including evidence that should not have been admitted. '[W]here the evidence offered by the State and admitted by the trial court—whether erroneously or not—would have been sufficient to sustain a guilty verdict, the Double Jeopardy Clause does not preclude retrial.' (*Lockhart v. Nelson* (1988) 488 U.S. 33, 34 [102 L.Ed.2d

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[6] Our decisions on defendant's first two challenges obviate the need to address his arguments of instructional error and the impact of *People v. Page*, *supra*, 3 Cal.5th 1175.

265].) Accordingly, 'a reviewing court must consider all of the evidence admitted by the trial court in deciding whether retrial is permissible under the Double Jeopardy Clause . . . .' (*Id*. at p. 41.) We have followed the high court in this regard. [Citations.]" (*People v. Story, supra*, 45 Cal.4th at pp. 1296-1297.)

B. *Vehicle Code section 10851*

Vehicle Code section 10851, subdivision (a) provides in pertinent part: "Any person who drives or takes a vehicle not his or her own, without the consent of the owner thereof, and with intent either to permanently or temporarily deprive the owner thereof of his or her title to or possession of the vehicle, whether with or without intent to steal the vehicle, or any person who is a party or an accessory to or an accomplice in the driving or unauthorized taking or stealing, is guilty of a public offense . . . ." Thus, assuming that a defendant's conduct concerns "a vehicle not his . . . own," and occurs "without the consent of the owner thereof," Vehicle Code section 10851, subdivision (a) may be violated in four different ways: (1) driving a vehicle with the intent to permanently deprive the owner; (2) driving a vehicle with the intent to temporarily deprive the owner; (3) taking a vehicle with the intent to permanently deprive the owner; and (4) taking a vehicle with the intent to temporarily deprive its owner. (*Ibid*.)

C. *Aiding and Abetting*

"All persons concerned in the commission of a crime, . . . whether they directly commit the act constituting the offense, or aid and abet in its commission, . . . are principals in any crime so committed." (§ 31.) "[A] person aids and abets the commission of a crime when he or she, acting with (1) knowledge of the unlawful purpose of the perpetrator; and (2) the intent or purpose of committing, encouraging, or facilitating the commission of the offense[;] (3) by act or advice aids, promotes, encourages or instigates, the commission of the crime. [Citation.]" (*People v. Beeman* (1984) 35 Cal.3d 547, 561.) "Thus, proof of aider and abettor liability requires proof in three distinct areas: (a) the direct perpetrator's actus reus—a crime committed by the

direct perpetrator, (b) the aider and abettor's mens rea—knowledge of the direct perpetrator's unlawful intent and an intent to assist in achieving those unlawful ends, and (c) the aider and abettor's actus reus—conduct by the aider and abettor that in fact assists the achievement of the crime. [Citation.]" (*People v. Perez* (2005) 35 Cal.4th 1219, 1225.) Mental state is often proven circumstantially. (*People v. Thomas* (2011) 52 Cal.4th 336, 355.) Factors relevant to prove aiding and abetting include " 'presence at the scene of the crime, companionship, and conduct before and after the offense.' " (*People v. Campbell* (1994) 25 Cal.App.4th 402, 409; accord, *In re Juan G*. (2003) 112 Cal.App.4th 1, 5; *In re J.R*. (2018) 22 Cal.App.5th 805, 814, review granted Aug. 15, 2018, S249205.)

D. *Application*

Viewing the evidence in the light most favorable to the judgment, we find substantial evidence support's defendant's conviction under an aiding and abetting theory. Defendant is correct that mere presence as a passenger in a stolen vehicle does not support a conviction for aiding and abetting the unlawful taking of a car. (See, e.g., *People v. Clark* (1967) 251 Cal.App.2d 868, 874; *People v. Lewis* (1947) 81 Cal.App.2d 119, 125.) Here, however, we have much more than defendant's mere presence in the stolen car.

First, regarding companionship, defendant and Culver were known associates of one another. Defendant was with Culver when he was introduced to Gloria. Defendant and Culver also were together on the evening in question and had allegedly planned to stay in Gloria's hotel room after Marlin left because they had nowhere else to go. They were walking together when Marlin confronted them. Further, defendant and Culver were arrested together in Marlin's car some hours after its theft.

Second, defendant was present at the scene and participated in the beating that facilitated the taking. Marlin's testimony and statements to authorities established that he was beaten by two men who drove away in his car without his permission. Shortly after

the crime, surveillance video captured Culver driving Marlin's car just before an injured Marlin staggered into the camera's field of vision. The interior of the car was not visible. Nonetheless, defendant had injuries consistent with having been in a physical fight when he was arrested, which was consistent with Marlin's testimony that both men participated in the fight. Defendant's suggestion that he was initially knocked out and never rejoined the fight is contrary to the record, which clarified that Marlin knocked one of his attackers "to the ground," but that person rejoined the fight.

Other circumstances likewise support that defendant intentionally aided Culver in taking Marlin's car. Culver knew of Marlin, who was having a romantic relationship with Culver's ex-girlfriend Gloria. Marlin also was aware of Culver, and there had been some overlap in their respective relationships with Gloria.

Thus, substantial evidence established: (1) defendant was friends with Culver, (2) defendant was at the scene with Culver, (3) both men fought Marlin after he approached them in his car, (4) the fighting incapacitated Marlin, (5) the men then left in Marlin's car without Marlin's permission, (6) shortly after the crime, the car was being driven by Culver, and (7) Culver was still driving the car with defendant as a passenger hours later when they were arrested. Under these circumstances, the jury could have inferred defendant knew of and shared Culver's intent to take Marlin's car and that defendant facilitated that taking. Thus, substantial evidence supports defendant's liability as an aider and abettor to a violation of Vehicle Code section 10851, subdivision (a).

DISPOSITION

Having determined the trial court erred prejudicially in admitting the preliminary hearing testimony of Marlin, but that substantial evidence supported defendant's conviction, we reverse the judgment and remand for retrial.

KRAUSE, J.

We concur:

ROBIE, Acting P. J.

HOCH, J.